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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 834

WILBUR E. DOW,

Petitioner,

vs.

HAROLD L. ICKES, SECRETARY OF THE INTERIOR, AND HENRY L. STIMSON, SECRETARY OF WAR.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA AND BRIEF IN SUPPORT THEREOF.

WILBUR E. DOW, JR.,
WILLIAM G. SYMMERS,
Counsel for Petitioner.

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HAROLD L. ICKES, SECRETARY OF THE INTERIOR, AND HENRY L. STIMSON, SECRETARY OF WAR.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

To the Honorables, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioner, Wilbur E. Dow, prays that a writ of certiorari be issued to review a final decree of the United States Court of Appeals for the District of Columbia entered on August 4th, 1941, affirming the orders of dismissal of the District Court of the United States for the District of Columbia and granting the motions of the respondents for dismissal of petitioner's action at law.*

* The time within which to file petition for certiorari was extended to and including January 3rd, 1942 (R. 56).

Jurisdiction.

The final decree of the United States Court of Appeals for the District of Columbia was entered on August 4th, 1941. The jurisdiction of this Court is invoked under Section 240, Judicial Code (28 U. S. Code Sec. 347(a)).

Statutes and Rules Involved.

1. Section 1 of the Act of Congress, June 6, 1924, 42 Stat. 464, as amended June 18, 1926, 44 Stat. 752, reading as follows:

> Section 1. That for the purpose of protecting and conserving the fisheries of the United States in all waters of Alaska, the Secretary of Commerce from time to time may set apart and reserve fishing areas in any of the waters of Alaska over which the United States has jurisdiction, and within such areas may establish closed seasons during which fishing may be limited or prohibited as he may prescribe. Under this authority to limit fishing in any area so set apart and reserved, the Secretary may (a) fix the size and character of nets, boats, traps, or other gear and appliances to be used therein; (b) limit the catch of fish to be taken from any area; (c) make such regulations as to time, means, methods and extent of fishing as he may deem advisable. From and after the creation of any such fishing area and during the time fishing is prohibited therein, it shall be unlawful to fish therein or to operate therein any boat, seine, trap, or other gear or apparatus for the purpose of taking fish; and from and after the creation of any such fishing area in which limited fishing is permitted such fishing shall be carried on only during the time, in the manner, to the extent, and in conformity with such rules and regulations as the Secretary prescribed under the authority herein given: *Provided, That every such regulation made by the Secretary of Commerce shall be of general application within the particular area to which it applies, and that no exclusive or several right of fishery shall be granted therein, nor shall any citizen*

of the United States be denied the right to take, prepare, cure, or preserve fish or shellfish in any area of the waters of Alaska where fishing is permitted by the Secretary of Commerce. The right herein given to establish fishing areas and to permit limited fishing therein shall not apply to any creek, stream, river, or other bodies of water in which fishing is prohibited by specific provisions of this Act, but the Secretary of Commerce through the creation of such areas and the establishment of closed seasons may further extend the restrictions and limitations imposed upon fishing by specific provisions of this or any other Act of Congress; Provided, further, that the Secretary of Commerce is hereby authorized to permit the taking of fish or shellfish, for bait purposes only, at any or all seasons in any or all Alaskan Territorial waters. (Italics ours.)

2. Rules and Regulations published according to the Federal Register Act, Sec. 7, (July 26, 1935, 49 Stat. 500, 502) appearing in 4 Fed. Reg. 908 (D. I.) and the amendments effective February 24, 1940, as appearing in 5 Fed. Reg. 747 (D. I.).

3. Sherman Anti-Trust Act, 26 Stat. 209, c. 647.

Opinions Below.

The opinion of the United States Court of Appeals for the District of Columbia written by Judge Rutledge and concurred in by Judges Groner and Edgerton, was decided August 4, 1941, and is reported in — F. (2d) —, 1942. Docket No. 7911.

Questions Presented.

1. Has the Court the power of review to determine if the Secretary of the Interior has exceeded the standards of discretion as laid down in the Act of Congress entitled, "An Act for the Protection of the Fisheries of Alaska and for Other Purposes"?

2. Has the Congress by that Statute reserved to all citizens, including petitioner, an equal right to fish by the

same method and under similar conditions as granted to any other citizen or corporation?

3. Is the denial of the right of the petitioner to fish by the same method and under the same conditions as those presently enjoying this right to the exclusion of all others

(a) an abuse of discretion on the part of the respondents under the terms of the Statute;

(b) exercise of authority in excess of the standards set up within the Statute;

(c) the maintenance of an unlawful monopoly?

Summary and Statement of Matter Involved.

In November 1939, the petitioner applied to the Bureau of Fisheries of the Department of the Interior, as required by the Secretary, for the allocation by that Bureau of two sites wherein he might erect structures called fish traps for the capture of salmon in the coastal waters of Alaska. Prior to that date, the petitioner had duly applied for and received his Territorial license from the Treasurer of the Territory of Alaska and duly made application to the War Department for a permit for the construction of such traps under the rules of that Department to prevent the erection of any obstructions to navigation.

On January 6, 1940, the respondent, Harold L. Ickes, Secretary of the Interior, announced the issuance of the Alaska Fishing Regulations of the Bureau of Fisheries for the season of 1940, in which the sites requested by the petitioner were not included, although approximately 500 trap sites were listed therein. As the War Department, under an agreement with the Department of the Interior, issues only one permit for the erection of a trap on each site, petitioner was precluded from enjoying his right of fishery under the statute.

An action at law was brought in the United States District Court for the District of Columbia with a broad prayer for relief requesting the equal right to fish in common with those applications for trap sites which had been granted. The Secretary of War was included in the action, as by his failure to issue more than one permit for the erection of a trap on each site and that permit only to the party who first requested the site to be opened by the Secretary of the Interior, he effectually prevented any use of that site for the erection of a fish trap by any one other than the original applicant; your petitioner therefore had no alternative but to prospect for sites of his own and then apply for their opening in the usual way. Thereafter, both respondents moved to dismiss, which motions were granted in the District Court and affirmed by the United States Court of Appeals for the District of Columbia.

The petitioner has maintained and still maintains that:

(a) At no time are sites for the erection of traps ever included in the Alaska fishing Regulations of the Department of the Interior except at the specific request of some person or corporation, there being no general open area for the erection of fish traps in any area of Alaska, and each site so included in the Regulations is of such size as to permit the erection of only a single trap on each site.

(b) With the exception of only three traps that are privately owned, all traps in the Aleutian Peninsula area and the Western part of Alaska are owned by three large corporations. In Southeastern Alaska, which constitutes the only other area of Alaska open or suitable for trap fishing, over 60% of the traps are owned by four large companies and 80% of all traps in that area are owned or controlled by nine companies.

(c) That the three corporations who own all but three out of approximately 200 traps in the Western area of Alaska are the corporate descendants or successors in interest to the four corporations amongst which the Western area of Alaska was divided up by President Hoover in 1924 in order to better "control" the fishing in that area.

(d) The complaints which arose by reason of such arbitrary division of fishing grounds as described above, resulted in the Act of Congress herein involved and set forth on Page 3 of this petition.

(e) That this statute prescribed certain limits upon the Secretary's discretion and set up standards beyond which he might not go and that his arbitrary refusal to open the sites requested by petitioner, or designate any open area into which he might go to find one satisfactory to the Secretary, while opening sites requested by the large corporations year after year, is an abuse of discretion under the terms of the Statute.

(f) That the net result of the foregoing is the creation of an unlawful monopoly, the recurrence of which the Statute itself was specifically designed to prevent.

The petitioner in this action has for a greater part of his life been engaged in the Alaska fishing industry in the employ of other corporations and individuals, but when he sought to strike out for himself, erect his own traps and thus provide fish for his own cannery or one to be leased by him, he found that there was what amounted to an airtight monopoly under the protection of both the Department of the Interior and the War Department which prevented him or any new-comer from engaging in the fishing industry through the erection of fish traps in any part of Alaska. In January 1940, 20 trap sites were closed by the Department out of over 500 open the year

before, but all of those closed were either unproductive or sites upon which no regular fish trap had ever been erected. Although these sites were closed for what were said to be reasons of conservation, the regular fishing season was considerably lengthened to permit all fishermen and trap operators to make a still greater catch to supply the ever-increasing demand for food during the present emergency.

The Statute in question limits the Secretary's authority by providing: "That every such regulation made by the Secretary of Commerce (Interior) shall be of general application within the particular area to which it applies and that no exclusive or several right of fishery shall be granted therein, nor shall any citizen of the United States be denied the right to take, prepare, cure or preserve fish or shellfish in any area of the waters of Alaska where fishing is permitted by the Secretary of Commerce (Interior)".

A fish trap is a pile structure built like one side of a wharf which extends out into the sea a distance of about 1,000 feet. Wire netting is stretched between the pilings to induce the fish to travel the length of the structure and devices built at the end thereof tend to keep the fish from leaving until this "heart" has been "brailed" out (scooped out with a net) by the trap tender.

A trap attacks general run fish which do not "school up". It is only the schooling fish which may be caught by a seine fisherman from boats, which is the only other commercial method of any importance of catching fish in Alaska. The maintenance of traps has a steadying influence on the entire industry as it supplies canneries with fish when the schooling fish followed by the same boats have gone to distant waters. They are found by prospecting much like gold and when built, often prove unprofitable, the fish for reasons of their own having taken a different route to their spawning grounds.

Experience has shown that the best method of trap control is an increase or decrease in the weekly closed period and this method has, to some extent, been followed by the Secretary of the Interior. It is by far the most equitable method as it can control the catch irrespective of the number of traps. There are many thousands of miles of Alaska coast line and the largest number of traps ever erected in Alaskan waters about 25 years ago when there were no restrictions was only a little over 700. An increase in the weekly closed period could lower the catch to any given point irrespective of the number of traps in existence. While this Court has not the power to tell the Secretary of the Interior just how he must exercise his discretion, it may certainly prevent an abuse of discretion when there are other more equitable ways of accomplishing the results sought by the Statute.

Petitioner does not seek trap sites prospected for, applied for and erected by others, even though under the terms of this Act, he has an equal right to fish there in common with the discoverer of the site and builder of the trap. Such a practice would lead to "trap jumping" and a form of legalized commercial warfare. Petitioner seeks, however, not the rights of others, but merely equal rights of his own. As long as fish traps are permitted in the waters of Alaska, that method of fishing should be open to all who desire to risk their money and effort to make it profitable.

The Secretary of the Interior should not be allowed to circumvent the prohibition against monopoly by the method of reducing the size of trap sites to the point where they will accommodate only one trap and then falling back on the phrase in the Statute, "where fishing is permitted by the Secretary of Commerce (Interior)".

Prior to 1927, all Alaska was open to fishing except cer-

tain specified areas as the mouths of streams, spawning beds, etc. In 1927, Regulations were, without hearings or prior notice of any kind, turned completely about and all Alaska was said to be closed to fishing except the certain specified areas which would accommodate only a single trap. This worked well as long as all applications were granted and the capture of fish controlled by the increase and decrease in the weekly closed period required of all traps. In 1938, however, the Secretary of the Interior discontinued this practice and "froze" all the sites, leaving those open which were in force, but declining to open any new ones. The result of this practice was to give those in prior possession of such traps a monopoly of the entire industry, which the Secretary erroneously or unknowingly insisted upon maintaining.

Reasons for Granting Petition.

The petition should be granted because the United States Court of Appeals for the District of Columbia has decided an important question of Federal law, namely, the equal right of all citizens of fishery in the waters of Alaska. This question has not been, but should be, settled by this Honorable Court.

The opinion of the court below is not based upon any prior decision, although some cases are cited therein in support of collateral issues, but the case is one for review by your Court when the Statute invoked, in so many words, reserves to any citizen the very right which the court denies.

The proper determination of this Federal question is of great importance to the citizens and natives of Alaska who, under the decision of the Court of Appeals, are denied the right to erect fish traps in the tidal waters in their own

front yards, although one of the large corporations which has a monopoly on the business may have a trap on each side of them.

WILBUR E. DOW,
By WILBUR E. DOW, JR.,
WILLIAM G. SYMMERS,
Counsel for Petitioner.

STATE OF NEW YORK,
County of New York, ss:

Wilbur E. Dow, Jr., being duly sworn, according to law, deposes and says that he is counsel for the petitioner herein and that the facts set forth in the foregoing Petition are true and correct to the best of his knowledge, information and belief.

WILBUR E. DOW, JR.

Sworn to and subscribed before me this 2nd day of January, 1942.

VIOLA C. OTTAVIANO,
[SEAL.] *Notary Public, Westchester County.*

New York County Clerk's No. 83.
Commission Expires March 30, 1943.

I hereby certify that I have examined the foregoing Petition and that in my opinion it is well founded and entitled to the favorable consideration of the Court and that it is not filed for the purpose of delay.

WILBUR E. DOW, JR.,
Counsel for Petitioner.